UPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 95

COMMISSIONER OF INTERNAL REVENUE,

Petitioner,

—v.—

THE SHAW-WALKER COMPANY

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONSE TO THE COMMISSIONER'S REPLY MEMORANDUM

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32 CASE PRESS INC., 421 HUDSON ST., N.Y.—OREGON 5-4540

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In his Reply Memorandum the Commissioner opposes the taxpayer's request that this case and the *Donruss* case* be consolidated. His only ground is that consolidation "would delay the argument and decision of *Donruss* for several months." Reply Memorandum, 2.

(1) The Commissioner's contention exaggerates the delay involved in consolidation. *Donruss* is scheduled for argument during the week of October 21. Counsel for Shaw-Walker are willing to accelerate briefs so that the consolidated cases may be argued in November.

* *United States* v. *Donruss Co.*, 384 F.2d 292; petition for certiorari granted April 22, 1968, No. 17, this Term.

(2) The Commissioner's present interest in expedition has only recently developed:

(a) While testimony was being taken in *Donruss*, the Commissioner sought to have the proceedings stayed for a period of "maybe two years or more"* while he sought evidence, even though he conceded that such a remedy was "unusual".**

(b) The Commissioner sought from counsel for The Shaw-Walker Company a delay in the trial of the *Shaw-Walker* case because of the death of one of his counsel. Counsel for the taxpayer consented, and thereby the trial of the *Shaw-Walker* case was eventually put off for a full year.***

(3) The question in *Donruss* and *Shaw-Walker* has been a mooted point in the construction of the accumulated earnings tax statutes for more than fifty years. Its definitive resolution is said by the Commissioner to be generally important because it will affect more than 500 pending cases.**** The Commissioner's insistence that the issue be decided by shunting to one side a case before this Court in which there is a full record and focusing entirely on a case in which there is the sketchiest of records is unfair and not conducive to a satisfactory resolution of the issue. To offer Shaw-Walker as a sop the right to file a brief

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* The quoted words are those of the District Judge, *United States* v. *Donruss, supra,* Record on appeal, 18a.

** *United States* v. *Donruss, supra,* Brief for Appellant in the Court of Appeals for the Sixth Circuit, 16-18.

*** *Commissioner of Internal Revenue* v. *The Shaw-Walker Company.* Appendix to Petitioner's Brief in the Sixth Circuit, 3a-4a, 7a.

**** *United States* v. *Donruss, supra,* Petition for Certiorari, 8.

amicus curiae in *Donruss* (which Shaw-Walker has done—the brief having been filed in this Court on August 10, 1968 does not offer a satisfactory method of presenting to this Court the specific aspects of the issue which are illuminated by the record in *Shaw-Walker* and which record is not before this Court in the *Donruss* case. This does very little toward providing to the Court and all interested parties a full and fair presentation. The Commissioner's assertion that expedition of the decision in *Donruss* is of decisive importance is a pretext, based upon an apparent desire to maneuver the two cases so as to preclude from consideration the *Shaw-Walker* case which contains a record demonstrating vividly the error of the statutory construction which the Commissioner proposes for adoption by this Court.

CONCLUSION

It is submitted that this Court should grant the petition for certiorari in this case and consolidate it for argument with *United States* v. *Donruss.*

Dated: New York, New York
August 15, 1968

Respectfully submitted,

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